

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.2 Former Testimony or Statements of Unavailable Witness

B. Statements by Witnesses Made Unavailable by an Opponent

Insert the following paragraph on page 165 immediately before Section 5.3:

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, ___ Mich App ___ (2004). In *McPherson*, the defendant was convicted of murder. A co-defendant made a statement to police that identified the defendant as the shooter. Prior to trial the co-defendant died. His statement was admitted at trial. In applying the U.S. Supreme Court's holding in *Crawford v Washington*, ___ U.S. ___ (2004),* the Court of Appeals found the co-defendant's statement to police was "testimonial." However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its substance, but to impeach the defendant. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford v Washington*, *supra*, or the Confrontation Clause.

*For more information on *Crawford v Washington*, see the June 2004 update to Section 5.7.

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.8 Expert Testimony on Battering and Its Effects

A. Criteria for Admitting Expert Testimony

Insert the following text near the top of page 192 after the second paragraph:

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, ___ Mich ___, ___ (2004), reiterated the trial court’s gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

“MRE 702 has [] been amended explicitly to incorporate *Daubert*’s* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court’s fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on ‘novel’⁵² science—is reliable.

⁵² See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court’s gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not ‘novel’ has no bearing on whether the court’s gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is ‘novel.’ . . .”

Gilbert, *supra* at ____.

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). *Gilbert*, *supra* at ____.

**Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993).